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In the Supreme Court of the United States

OCTOBER TERM, 1990

AQUA-CHEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PETER WINKLER
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the layoff of striker replacements who had no reasonable expectation of recall creates job vacancies that trigger the reinstatement rights of unreinstated former strikers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983) 10

Beloit Corp. v. *NLRB*, 857 F.2d 1154 (7th Cir. 1988) 8

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 11

Davis v. *United States*, 417 U.S. 333 (1974) 14

Giddings & Lewis, Inc., 255 N.L.R.B. 742 (1981), enforcement denied, 675 F.2d 926 (7th Cir. 1982) 7

Giddings & Lewis, Inc. v. *NLRB*, 675 F.2d 926 (7th Cir. 1982) 6, 13

Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 379 U.S. 920 (1970) 3, 7

Medallion Kitchens, Inc. v. *NLRB*, 806 F.2d 185 (8th Cir. 1986), cert. denied, 481 U.S. 1037 (1987) 12, 13

Mike Yurosek & Son, Inc., 295 N.L.R.B. No. 35 (June 15, 1989) 12

NLRB v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990) 11

NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 10, 11

NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) 3, 6, 10

Cases—Continued: Page

NLRB v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) 6
NLRB v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) 13
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) 3, 7, 9
NLRB v. *Mars Sales & Equipment Co.*, 626 F.2d 567 (7th Cir. 1980) 9
Trans World Airlines, Inc. v. *Independent Federation of Flight Attendants*, 489 U.S. 426 (1989) 10
Wisniewski v. *United States*, 353 U.S. 901 (1957) 14

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(3), 29 U.S.C. 152(3) 3
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 5
§ 8(a)(3), 29 U.S.C. 158(a)(3) 3, 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-13) is reported at 910 F.2d 1487. The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. 1-4) is reported at 922 F.2d 403. The decision and order of the National Labor Relations Board (Pet. App. 14-54) is reported at 288 N.L.R.B. 1108.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1990, and a petition for rehearing was denied on January 8, 1991. The petition for a writ of certiorari was filed on April 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a manufacturing facility in Greenville, Mississippi. In March 1980, negotiations between petitioner and its employees' union for a new collective bargaining agreement broke down, and petitioner's employees went out on strike. The strike ended in August 1980. At that time, petitioner's work force consisted of 69 permanent striker replacements and 25 former strikers. The strike settlement agreement negotiated by the parties included the substantive provisions of a new collective-bargaining agreement, as well as provisions for the recall of striking employees. Under the latter provisions, striking employees were to be returned to work "as job vacancies occurred." Pet. App. 6, 16, 31-32. The parties negotiated a new collective bargaining agreement in December 1981. The parties "agreed to abide by the provisions of the earlier agreement pertaining to the reinstatement rights of strikers" (*id.* at 16), but also "provided for recall from layoff 'in reverse order of layoff'" (*id.* at 6).

In March 1982, petitioner laid off 15 employees—14 striker replacements and one former striker—because of lack of work. Petitioner told the laid-off workers that its economic situation was bad and that the layoff was for an indefinite period. Petitioner also informed those employees that their life insurance would be canceled immediately, that their medical insurance would terminate at the end of the next month, and that they should look for other jobs or apply for unemployment compensation. Pet. App. 6, 16, 33. Between May and August 1982, petitioner recalled three of the laid-off striker replacements. It did not offer positions to any of the former strikers who were not reinstated at the conclusion of the 1980 strike. *Id.* at 15 n.1, 17.

2. The administrative law judge (ALJ) found that petitioner's decision to recall the laid-off replacements rather

than reinstate more senior former strikers violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3). He found that the layoff of the replacements constituted a "departure" within the meaning of *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), and that the unreinstated strikers were therefore entitled to preferential consideration for the resulting job vacancies. Pet. App. 50-51.

The Board affirmed on different grounds. It rejected the ALJ's reasoning that an economic layoff of permanent replacements for a prolonged indefinite period automatically constitutes a vacancy that triggers the unreinstated strikers' *Laidlaw* rights. Pet. App. 18. That rule, the Board stated, failed to take adequate account of the employer's right, established in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), to treat replacements hired during an economic strike as permanent employees. Pet. App. 18-19. The Board also noted, however, that under Section 2(3) of the Act, 29 U.S.C. 152(3), strikers remain employees unless they obtain equivalent employment elsewhere and that economic strikers have a statutory right to vacancies at the conclusion of a strike. Pet. App. 19-20, citing *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and *Laidlaw*, *supra*.

Balancing those two rights, the Board held that, to establish a violation of strikers' *Laidlaw* rights by virtue of the preferential rehire of laid-off replacements, the General Counsel must show that the replacements' layoffs "truly signified" their departure—*i.e.*, "that, based on objective factors, the laid-off permanent replacements had no reasonable expectancy of recall." Pet. App. 20. The burden then shifts to the employer to show that no such vacancy occurred "or that its failure to recall the striker was otherwise based on legitimate and substantial business justifications." *Ibid.*

Applying that test to the facts, the Board found that the General Counsel met his burden of establishing that, at the time of the layoffs, the laid-off striker replacements had no reasonable expectancy of recall. The Board relied on the fact that "employees were advised that the layoff was due to a lack of work and for an indefinite period, that their insurance benefits were to be canceled, and that they should look for another job or apply for unemployment compensation." Pet. App. 21-22.[1] The Board further found, in agreement with the ALJ, that petitioner had failed to establish its asserted justification that the collective bargaining agreement effectively waived the strikers' recall rights by providing that recalls from job layoffs were to proceed in "reverse order of layoff." *Id.* at 18 n.4, 22 n.7, 47-50; see *id.* at 6, 16.[2] Accordingly, the Board held that petitioner

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[1] The Board found that this evidence establishing that the laid-off employees did not have a reasonable expectancy of recall was not overcome by a "vague representation" in petitioner's letter to those employees that it would make every effort to return them to work as soon as possible. Pet. App. 22.

[2] The ALJ, applying the principle that a waiver of the strikers' statutory *Laidlaw* rights must be clear and unmistakable, found "no credible evidence on which to base a conclusion that the parties understood, discussed, or even assumed that the strike settlement would exclude unreinstated strikers from reinstatement in the event of a layoff of replacements." Pet. App. 49. Thus, he noted that during the 1980 negotiations "there was no discussion concerning the recall rights of reinstated strikers in the event of a layoff of replacements," and that petitioner "throughout negotiations insisted consistently and steadfastly that the collective-bargaining agreement and the provisions of the strike settlement agreement dealing with the reinstatement of strikers were separate and unrelated." *Ibid.* The ALJ concluded that "the term 'vacancy' in the strike settlement agreement must therefore be controlled by the statutory definition of rights pursuant to the Board's decision in *Laidlaw Corp.*," rather than by the "terms in the recall procedure" of the collective-bargaining agreement. *Id.* at 49-50.

violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by offering the job openings to laid-off replacements rather than unreinstated former strikers. Pet. App. 22. The Board ordered petitioner to offer reinstatement, with backpay, to those unreinstated strikers for whom positions were available. *Id.* at 23.[3]

3. The court of appeals affirmed the Board's decision and enforced its order. Pet. App. 5-13. The court, like the Board, pointed out that due regard for the rights of unreinstated strikers and permanent replacements required the Board to accommodate the conflicting policies of *Fleetwood Trailer*, which recognized that economic strikers are entitled to reinstatement at the conclusion of a strike, and *Mackay*, which held that a company may hire permanent replacements during an economic strike. Pet. App. 7-8. The court concluded that the Board's test was "both rational and consistent with the policies behind the NLRA because it comports with the *actual* expectations of all concerned: the unreinstated strikers, the replacement workers and the company." *Id.* at 9. It also concluded that the Board's test "str[uck] a fair balance between the competing policies." *Id.* at 9-10. The court further held that the Board's factual finding that the laid-off employees had no reasonable expectancy of recall was supported by "substantial, and unrebutted, evidence." *Id.* at 10.

Petitioner sought rehearing and suggested rehearing en banc. All of the judges on the original panel voted to deny rehearing, and a majority of the circuit judges voted to deny

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[3] The Board also adopted the ALJ's finding that petitioner violated Section 8(a)(1) of the Act by its August 1982 letter to unreinstated strikers threatening cutoff of reemployment rights should they fail to furnish written notice within five days of their intention to retain those rights. Pet. App. 15 n.2. The court of appeals sustained that finding (*id.* at 11-13), and it is not an issue here.

rehearing en banc. Judge Posner, in a dissent joined by three other judges, stated that the panel decision was inconsistent with the Seventh Circuit's earlier decision in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (1982), which he viewed as the "sounder decision." Pet. App. 3-4. Judge Posner read the collective bargaining agreement's provision for recall in reverse order of layoff as superseding the statutory right, recognized in *Fleetwood Trailer* and the strike settlement agreement, of striking employees to return to work. *Ibid.*

ARGUMENT

The court of appeals correctly concluded that the Board's new rule respecting the rights of laid-off striker replacements and unreinstated former strikers is a reasonable accommodation of the competing interests and that it was properly applied in this case. The court's decision on this issue "of first impression" (Pet. App. 7) does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Economic strikers retain their status as employees under the National Labor Relations Act and are entitled to full reinstatement to their former positions at the conclusion of a strike. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). If, after the strikers have offered to return to work, the employer refuses to reinstate them, "the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by * * * the Act * * *. Accordingly, unless the employer * * * can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

It is also settled that an employer faced with an economic strike may choose to continue his business during the strike by hiring permanent replacements to perform the work of striking employees. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). After the strike ends, he "is not bound to discharge those hired to fill the places of strikers * * * in order to create places for them." *Id.* at 345-346. However, when an employer exercises his right to replace economic strikers, the former strikers retain their preferential reinstatement rights, and are "entitled to full reinstatement upon the *departure* of replacements," unless the employer can "sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-1370 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970) (emphasis added).

This case involves the question of when a layoff of striker replacements should be considered a "departure" within the meaning of *Laidlaw*, so as to trigger the strikers' rights to reinstatement. Previously, the Board had held that a layoff of striker replacements for a long and indefinite period automatically amounted to a departure and thereby created a job vacancy, so that the recall of replacements over strikers (or the mere maintenance of a policy providing for such recall) violated the strikers' reinstatement rights. *Giddings & Lewis, Inc.*, 255 N.L.R.B 742, 743-745 (1981), enforcement denied, 675 F.2d 926 (7th Cir. 1982). After further consideration of the question, the Board, abandoning its per se approach, announced a new rule in this case.

Under that rule, the burden is on the General Counsel to establish, based on objective factors, that, at the time of the layoff, the replacements had no reasonable expectancy of recall.[4] The relevant objective factors include

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[4] That test is essentially the same as the Board's well-established and judicially approved test for determining the voting eligibility of

evidence concerning the employer's past experience, the employer's future plans, the length of the layoff, the circumstances of the layoff, and what the employee was told regarding the likelihood of recall. Once the General Counsel has established a prima facie case that a vacancy exists to which the striker is entitled under *Laidlaw*, the burden then shifts to the employer to show that in fact no such vacancy occurred or that its failure to recall the striker was otherwise based on legitimate and substantial business justifications. Pet. App. 20.

The court of appeals correctly concluded that the Board's new rule is "both rational and consistent with the policies behind the NLRA because it comports with the *actual* expectations of all concerned; the unreinstated strikers, the replacement workers and the company." Pet. App. 9. Thus, when a striker replacement is laid off with no reasonable expectation of recall, the replacement, at the time of layoff, no longer has any reason to believe that he or she has a job with the employer. The employer's perception of the status of the replacements is the same. And, in those circumstances, the unreinstated strikers have a justified expectation of vindicating their *Laidlaw* right to reinstatement.

Contrary to petitioner's assertion, the Board's rule does not place "both the employer and the replacements * * * 'at sea' with respect to what offers of permanency can be made and what offers of permanency are valid." Pet. 11. The "reasonable expectation of recall" test rests on objective factors which have been delineated in the many years that the test has been applied to determine employee eligibility to vote in Board elections. See note 4, *supra*. Moreover, a striker replacement's prospect for permanency under *Mackay* is neither absolute nor risk free. The replace-

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employees on layoff status. See, for example, *Beloit Corp.* v. *NLRB*, 857 F.2d 1154, 1157 (7th Cir. 1988) (collecting cases).

ment may be displaced by a strike settlement agreement that provides for immediate recall of the strikers, or by a change in business conditions that causes jobs to be abolished. The risk of losing a job due to a layoff that, at the time, appears to be permanent, is qualitatively no different from these other risks that a striker replacement must assume.

2. There is no merit to petitioner's contention (Pet. 7-9) that the decision below conflicts with *Mackay* and subsequent decisions of this Court affirming the employer's right to hire permanent replacements for economic strikers. In *Mackay*, the Court recognized the employer's right to continue to operate in the face of an economic strike and, to that end, accorded it the ability to offer employment to striker replacements that does not terminate at the conclusion of the strike. 304 U.S. at 345-346.[5] In *Mackay* the Court did not address the question here—whether subsequently laid-off replacements can be said to have "departed," thereby creating a job vacancy, for purposes of triggering the strikers' *Laidlaw* rights.

The rationale of *Mackay* does not support denying strikers their *Laidlaw* rights in the circumstances presented here. While the employer's ability to continue his business is undoubtedly enhanced by the ability to offer striker replacements a job that is not coterminous with the strike, no such business justification attaches, months or years later, to preferential treatment of laid-off replacements over unreinstated strikers, where the former have no reasonable expectation of recall. The permanent replacement rule does

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[5] See also *NLRB* v. *Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980) ("The rationale for [the *Mackay*] exception to the general rule is that the employer's interest in continuing his business during a strike and the needed inducement of permanent employment to obtain replacements is a sufficient business justification overcoming protection for economic strikers.").

not exist in a vacuum, and this Court, while continuing to adhere to it, has refused to extend it beyond its logic. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963); *NLRB* v. *Fleetwood Trailer Co.*, *supra*.

Similarly, nothing in this Court's decisions in *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 489 U.S. 426 (1989) (*TWA II*), or *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), extends *Mackay* beyond its rationale or lends support to petitioner's argument. In *TWA II* the Court held that full-term strikers were not entitled to displace more junior employees who abandoned the strike and went back to work, taking the full-term strikers' jobs. The language quoted by petitioner (Pet. 6)—that if the strike proves unsuccessful, strikers "gamble" and "suffer the consequences" (*TWA II*, 489 U.S. at 438)—refers to the fact that a striker who has been permanently replaced must await a job vacancy before he can return to work. The Court had no occasion to address the question whether or when the layoff of replacements would create job vacancies that activate the strikers' replacement rights.

In *Belknap*, the Court held that the National Labor Relations Act did not preempt a state court breach of contract action by replacements who were offered "permanent" status during a strike but were then discharged, after the strike, to make room for former strikers. The portions of the Court's opinion quoted by petitioner (Pet. 8, 9) merely recognize that breach of a *Mackay*-based promise that the replacements will not be discharged to make room for returning strikers could give rise to a contract action against the employer. They do not suggest that such a promise could abridge the strikers' *Laidlaw* rights to job vacancies that may arise in the future.

Moreover, this Court has repeatedly admonished that, where the policies of *Mackay* and reinstatement rights must be accommodated, "the balancing of the conflicting legiti-

mate interests * * * [is] committed primarily to the National Labor Relations Board, subject to limited judicial review." *Erie Resistor Corp.*, 373 U.S. at 236. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990), and cases cited therein; see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 nn. 11-14, 845 (1984). This case presents such an instance, and the decision of the court of appeals upholding the Board's rule should be left undisturbed.

3. Petitioner's further contention that the Board's application of its rule deprived the striker replacements of their contract rights is inconsistent with the Board's actual findings. Petitioner argues that, "[a]t the time of the layoff, each replacement was contractually assured that they would be recalled in reverse order of layoff provided the recall opportunity occurred during their defined period of seniority retention." Pet. 7. "It is illogical," petitioner adds, "to hold that an employee has no reasonable expectation of being able to exercise a contractually guaranteed right shared with all other employees covered by the contract." *Ibid.* However, petitioner's argument, like that of Judge Posner's dissent from the denial of rehearing en banc (Pet. App. 2-4), rests on the premise that the contract provision respecting recall from layoff was intended to alter the strikers' *Laidlaw* rights. The ALJ found (Pet. App. 47-50)—and the Board sustained his finding (*id.* at 18 n.4, 22 n.7)—that there was "no credible evidence on which to base a conclusion that the parties understood, discussed, or even assumed that the strike settlement agreement would exclude unreinstated strikers from reinstatement in the event of a layoff of replacements." *Id.* at 49.

In short, the contractual recall provision in this case does not answer the question whether striker replacements who are laid off are entitled to be recalled ahead of unreinstated strikers. The answer to that question, under *Laidlaw*, turns

on whether the layoff created a job vacancy. The Board held that the layoffs in this case did create job vacancies because the laid-off striker replacements had no objectively reasonable expectation of recall. The court of appeals properly found "the Board's factual conclusions on this issue to be supported by substantial, and unrebutted, evidence." Pet. App. 10. Those employees were told that their layoffs were indefinite, that their life insurance would be canceled immediately, that their medical insurance would be terminated at the end of the next month, and that they should look for other jobs or apply for unemployment compensation.[6] In any event, whether the parties intended the recall provision to apply in a case such as this is not an issue warranting review by this Court.

4. Petitioner is also incorrect in asserting (Pet. 9-11) that the court of appeals' decision warrants review because it is inconsistent with decisions of other courts of appeals. Petitioner relies on *Medallion Kitchens, Inc.* v. *NLRB*, 806 F.2d 185 (8th Cir. 1986), cert. denied, 481 U.S. 1037 (1987). In that case, the court held that the employer violated the National Labor Relations Act when, following a fire that shut down its operations, it returned striker replacements to work rather than former strikers. The decision turned on whether the striker replacements were temporary or permanent, and the court found that substantial evidence supported the Board's finding that they were temporary. 806 F.2d at 187, 190-191. While the court stated that, had the replacements been permanent, this would have afforded the employer a

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[6] Compare *Mike Yurosek & Son, Inc.*, 295 N.L.R.B. No. 35 (June 15, 1989), slip op. 5-6 (permanent replacements had a reasonable expectation of returning in December to the positions they had left the previous May, since the employer's past practice showed that "seasonal layoffs are defined, predictable, and clearly linked to the availability of the commodities with which the employees work").

substantial and legitimate business justification for its action (*id.* at 189), that statement is merely dictum. Moreover, the court had no occasion to consider the validity of the Board's present rule for accommodating the rights of permanent replacements and strikers in a layoff.

Petitioner also mistakenly relies on *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985). In that case, low-seniority, essentially part-time employees who crossed a picket line were awarded the driving slots of more senior strikers, which carried with them more regular employment. When the strike ended, the company reinstated the strikers as vacancies occurred but did not displace the employees who had crossed the picket line and been awarded full-time slots. *Id.* at 79. The Board found that the failure to displace those employees was the equivalent of granting them the kind of super-seniority condemned in *Erie Resistor*. The court of appeals disagreed, finding that the employer's conduct was more akin to granting permanent replacement status as sanctioned by *Mackay*. *Id.* at 80-81. As in *TWA II*, the court did not consider the effect of a subsequent layoff on the relative rights of replacements and unreinstated former strikers.

Finally, the Seventh Circuit's earlier decision in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (1982), is also distinguishable. As the panel noted in its decision (Pet. App. 10 n.4), in that case the court reversed a Board decision holding that an employer's policy statement giving preferential treatment to laid-off replacements violated the NLRA; no layoffs had yet occurred and thus there was no basis for determining whether they had created job vacancies. Moreover, as noted above, the Board has now repudiated its analysis in *Giddings* and adopted, in the instant case, a test giving more weight to the employer's right to hire permanent replacements. But even assuming arguendo that the decision below and the court's decision in *Giddings* are

irreconcilable, that conflict, and the en banc court dissenters' preference for *Giddings* (Pet. App. 3), raises only an intra-circuit disagreement that does not warrant this Court's review. See, *e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PETER WINKLER
Attorney
National Labor Relations Board

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